

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

Case No. 2004-535-FH

KERRY SPURLOCK,

Defendant.

OPINION AND ORDER

Defendant has filed a post-conviction motion for relief from judgment.

This matter arises out of an alleged road rage incident, wherein Defendant rammed his vehicle into another vehicle on November 11, 2003. On November 12, 2003, a felony warrant and complaint was filed against Defendant, charging him with one count of assault with a dangerous weapon (felonious assault), contrary to MCL 750.82. On August 23, 2004, a jury found Defendant guilty of felonious assault. On October 12, 2004, Defendant was sentenced to two years probation. On May 9, 2006, Defendant filed the instant motion.

Defendant contends that his attorney's failure to call him as a witness at trial denied the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution.

When reviewing a motion for relief from judgment, the Court initially examines the motion together with all the files, records, transcripts, and correspondence relating to the judgment under attack. MCR 6.504(B)(1). If it plainly appears from the face of the material described in subrule (B)(1) that the defendant is not entitled to relief, the Court shall deny the motion without directing further proceedings. The order must include a concise statement of the



reasons for denial. MCR 6.504(B)(2). If the entire motion is not dismissed under subrule (B)(2), the Court shall order the prosecuting attorney to file a response as provided in MCR 6.506, and shall conduct further proceedings as provided in MCR 6.505-6.508. MCR 6.504(B)(4). The Court may expand the record by including any additional materials deemed relevant to the decision on the merits of the motion, including affidavits and documents. MCR 6.507(A). The Court may make a decision after reviewing the motion, response, expanded record, and determine whether an evidentiary hearing is required. MCR 6.508(B). Defendant has the burden of establishing entitlement to the relief requested. MCR 6.508(D).

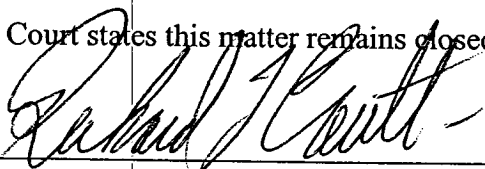
To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v. Washington*, 466 US 668; 104 S Ct 2052; 80 L.Ed.2d 674 (1984). See *People v. Pickens*, 446 Mich 298, 302- 303; 521 NW2d 797 (1994); *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.*, at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.*, at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). The failure to call a witness can constitute ineffective assistance only if the

failure deprived the defendant of a substantial defense, and a substantial defense is one that might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902; 554 NW2d 899 (1996).

In the case at hand, Defense counsel called an expert witness on accident reconstruction. The remainder of Defense counsel's defense relied upon cross-examination, and attacking the credibility of the complainant and witnesses. Defense counsel did not offer Defendant as a witness. The Court is satisfied that Defense counsel's decision to refrain from calling Defendant was a matter of trial strategy. This Court may not substitute its judgment for that of trial counsel on matters of trial strategy. *People v. Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The failure to call Defendant did not deprive him a substantial defense. *Hyland, supra*. Complainants and the witnesses testified as to the occurrence of events. The jury was entitled to accept this testimony, or accept Defendant's proffered version offered through his expert on accident reconstruction. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). Defendant has failed to establish that an error by counsel resulted in prejudice. *Carbin, supra*. Consequently, Defendant's motion for relief from judgment should be denied.

Based upon the reasons set forth above, Defendant's 6.500 Motion is DENIED. In compliance with MCR 2.602(A)(3), the Court states this matter remains closed.

IT IS SO ORDERED.



RICHARD L. CARETTI
Circuit Court Judge

Dated: June 29, 2006

cc: Curtis R. Williams, Esq.
Prosecutor's Office